STATE OF MICHIGAN

COURT OF APPEALS

VIRGIL WALKER,

Plaintiff-Appellant/Cross-Appellee,

v

FAMILY DOLLAR STORES OF MICHIGAN, INC.,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
January 18, 2005

No. 250415
Saginaw Circuit Court
LC No. 02-045179-NO

Before: Hoekstra, P.J., and Cavanagh and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition in this premises liability case. Defendant cross-appeals that portion of the trial court's order finding that the allegedly defective condition was open and obvious. We affirm the trial court's decision, and dismiss the cross-appeal as moot. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff, an invitee on defendant's premises, sustained injuries when he turned right at the end of an aisle and tripped on a box and a piece of cardboard. Plaintiff filed suit alleging that defendant breached its duty to maintain its premises in a reasonably safe condition and to warn of the unsafe condition. Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that it owed no duty to plaintiff because the condition was open and obvious, and that no evidence showed that it had actual or constructive notice of the condition. The trial court granted the motion pursuant to MCR 2.116(C)(10), finding that while a question of fact existed as to whether the condition was open and obvious, no evidence established that defendant had actual or constructive notice of the condition. The trial court rejected plaintiff's reliance on the doctrine of res ipsa loquitur on the ground that he could not demonstrate that the condition was under the exclusive control of defendant.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant's breach caused the plaintiff's injuries; and (4) that the plaintiff suffered damages.

Case v Consumers Power Co, 463 Mich 1, 6; 615 NW2d 17 (2000). A prima facie case of negligence may be based on legitimate inferences, provided that sufficient evidence is produced to take the inferences "out of the realm of conjecture." *Berryman v K-Mart Corp*, 193 Mich App 88, 92; 483 NW2d 642 (1992), quoting *Ritter v Meijer, Inc*, 128 Mich App 783, 786; 341 NW2d 220 (1983).

A possessor of land has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. The duty does not extend to a condition from which an unreasonable risk of harm cannot be anticipated, or from a condition that is so open and obvious that an invitee could be expected to discover it for himself. See *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609-610; 537 NW2d 185 (1995).

The open and obvious danger doctrine attacks the duty element that a plaintiff must establish in a prima facie negligence case. *Id*. at 612. Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). If special aspects of a condition make even an open and obvious risk unreasonably dangerous, a possessor of land must take reasonable precautions to protect an invitee from that risk. *Lugo v Ameritech Corp*, 464 Mich 512, 517-518; 629 NW2d 384 (2001). But where no such special aspects exist, the "openness and obviousness of the condition should prevail in barring liability." *Id.*

A storekeeper must provide reasonably safe aisles for customers. In a premises liability action, a plaintiff must show either that the defendant caused the unsafe condition, or that the defendant knew or should have known of the unsafe condition. Such knowledge may be inferred from evidence that the condition existed for a sufficient length of time for the storekeeper to have discovered it. *Berryman, supra*.

Under the doctrine of res ipsa loquitur, an inference of negligence can arise when the plaintiff's injury: (1) ordinarily would not have occurred in the absence of negligence; (2) was caused by an agency or instrumentality within the exclusive control of the defendant; and (3) was not due to any voluntary action or contribution of the plaintiff. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 194; 540 NW2d 297 (1995).

We affirm the trial court's grant of defendant's motion for summary disposition on the ground that no evidence showed that defendant had actual or constructive notice of the condition. Plaintiff's complaint alleged that a defective condition, i.e., the presence of a box and a piece of cardboard on the floor, proximately caused his fall. However, the fact that plaintiff observed boxes on the floor in aisles in other parts of the store and saw the same or a similar box in the same location one week later does not establish that defendant had actual or constructive knowledge that the box was on the floor at the time of plaintiff's accident. Plaintiff's allegation that defendant breached a duty by creating a defective condition on its premises was based on impermissible speculation. The possibility that a breach of duty by defendant caused plaintiff to sustain injuries is not sufficient to establish causation or to apply the doctrine of res ipsa loquitur. *Berryman*, *supra*; *Cloverleaf Car Co*, *supra*. The trial court properly decided the issue as one of law and granted summary disposition. *Reeves v K-Mart Corp*, 229 Mich App 466, 480; 582 NW2d 841 (1998).

Given our resolution of the principal appeal in defendant's favor, we dismiss defendant's cross-appeal as moot.[1]

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello

[1] Were we to consider the merits of defendant's cross-appeal, we would find it to be without merit. Plaintiff testified that he could not have seen the box and the cardboard even if he had been watching the area in which he was walking because they were concealed by the corner he was attempting to negotiate. Plaintiff's assertion that he could have seen the items had they been located in the middle of the aisle was made in response to a hypothetical question that was not based on the evidence. A question of fact existed as to whether the condition, i.e., the location of the box and the piece of cardboard, was open and obvious. *Novotney, supra*.